IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

SA.No. 724 of 1993()

AS.134/1990 of ADDITIONAL DISTRICT COURT,ALAPPUZHA
OS.1036/1986 of ADDITIONAL MUNSIFF,ALAPPUZHA

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APPELLANTS – APPELLANTS – DEFENDANTS 2 TO 4
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1. **MARIYAMMA GEORGE, PUNCHYAICHIRA HOUSE, THALAVADY VILLAGE.**
2. **GEORDY GEORGE -DO- -DO-**
3. **GEOBY GEORGE -DO- -DO- AGED 19**
4. **MANJU GEORGE -DO- -DO- (MINOR) AGED 14**

(MINOR 4TH APPELLANT IS REPRESENTED BY GUARDIAN FIRST APPELLANT)

BY ADV. SRI.P.G.PARAMESWARA PANICKER,P.GOPAL

RESPONDENT:

ANNAMMA MANUEL,
PADAMATTUMAL, PUTHUPPURAKKAL,
KOZHIMUKKU

BY ADV. SRI.P.GEORGE WILLIAM,NANDINI MENON

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 24/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A .NO.724 OF 1993

Dated 24th May 2007

J U D G M E N T

Defendants 2 to 4 in O.S.1036 of 1986 on the file of Additional Munsiff court, Alappuzha are appellants. First defendant died during the pendency of the suit and appellants were impleaded as his legal heirs. Respondent is plaintiff. Respondent is the direct sister of deceased first defendant. Respondent instituted the suit seeking a decree for injunction in respect of plaint schedule property. Plaint schedule property is 10 cents in survey No.485/2B/1 and 1 acre 67½ cents in survey No.485/2B/2 of Thalavady village. Case of respondent was that plaint schedule property includes Nilam and vachal (channel which takes water from northern thodu towards the south) and deceased defendant who has no manner of right or possession to the plaint schedule property attempted to trespass into the same and therefore he is to be restrained by a permanent prohibitory injunction from trespassing into plaint schedule property. Deceased

defendant filed written statement disputing the right of respondent over vachal portion described in the same. It was contended that the assignor of respondent has no right over the vachal which lies towards north of property transferred to the respondent under Ext.A2 and that property including vachal originally belonged to their deceased father Varghese Varkey and subsequently was sold in court auction and though auction purchaser purchased the property vachal was not put in the possession of auction purchaser and respondent is not entitled to any right over vachal which lies to north of the property obtained by respondent. Contending that, vachal portion was fraudulently included in Ext.A2 sale deed, defendant sought a counter claim to set aside the document with respect to that portion of vachal and also for a declaration of title of deceased first defendant over that portion of vachal.

2. Learned Munsiff framed necessary issues. On the evidence of Exts.A1 to A3 and Exts.B1 to B4 and PW1 and Dws.1 and 2, learned Munsiff granted a decree in favour of respondent and dismissed the counter claim. Appellant challenged decree and judgment before Additional District court, Alappuzha in A.S.134 of 1990.

Learned Additional District Judge on re-appreciation of evidence confirmed decree and dismissed appeal. It is challenged in second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

> 1) Whether courts below were justified in granting a decree for injunction to plaintiff without plaintiff identifying Ext.A2 property and vachal portion alleged to have been re-claimed and comprised in Ext.A2 property.
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> 2) Whether courts below were correct in holding that deceased defendant has no right over the vachal and the re-claimed portion, not included in Ext.A2.

4. Learned Senior counsel appearing for appellants and learned counsel appearing for respondent were heard.

5. Learned Senior counsel submitted that appellants are not disputing the rights of respondent over 1 acre 77½ cents obtained under Ext.A2 sale deed and as is clear from the evidence of DW2 the assignor, under Ext.A2, respondent obtained right, title and the possession over only 1 acre 77½ cents covered under

Ext.A2 and vachal referred to in Ext.A2 can only be the portion of vachal which lies within the property covered under Ext.A2. Learned counsel pointed out that as Ext.A2 recites about vachal as starts from northern thodu and as respondent was claiming that it includes vachal portion which lies further to the north of the 1.77½ acres covered under Ext.A2, deceased defendant sought decree in the counter claim to set aside Ext.A2 sale deed. But as Ext.A2 does not take any portion of the vachal which lies to north of 1 acres 77½ cents of property, there is no necessity for such a decree and Ext.A2 makes it absolutely clear that what was transferred under Ext.A2 by DW2 was only Nilam and vachal portion in the 1 acre 77½ cents and not any portion of vachal which lies further to its north and therefore there is no necessity to grant a decree as sought for. Learned Senior counsel also pointed out that appellants are not claiming any right over any portion of 1 acre 77½ cents covered under Ext.A2 and it may be clarified that decree is only in respect of said property and does not relate to vachal portion included under Ext.B2 property obtained by Mahadevan Subramania Iyyer under court auction. Learned counsel

appearing for respondent argued that in the counter claim contention of defendant was that vachal portion covered under Ext.A2 originally belonged to Varghese Varkey and defendant has title to that property as legal heir of Varghese Varkey and appellants also admitted that vachal portion covered under Ext.A2 is up to northern thodu and that is why they sought a decree in counter claim and in such circumstances, no clarification is necessary.

6. On hearing learned counsel appearing for appellants and going through the evidence, it is absolutely clear that respondent is claiming right over property only on the basis of Ext.A2 sale deed executed by DW2, Balakrishnan Nair. Balakrishnan Nair obtained the property transferred thereunder from Mahilasangham. Property transferred under Ext.A2 is 1 acre 77½ cents. The description of the property makes it absolutely clear that 1 acre 77½ cents consists of 10 cents of vachal portion and 1 acre 67½ cents of Nilam portion. Though learned counsel appearing for respondent vehemently argued that vachal shown in Ext.A2 is excluding Nilam of 1 acre 77½ cents comprised in 245/1 and that vachal extents up to northern thodu, a reading

of Ext.A2 reveals that the said submission is not correct. Ext.A2 makes it clear that total extent transferred thereunder is 1 acre 77½ cents. It is further recited that the property includes Nilam and vachal. Therefore, contention of respondent that respondent obtained 1 acre 77½ cents and vachal portion over and above 1.77 acre is not correct. Respondent could claim only 1 acre 77½ cents which include the Nilam and vachal portion covered thereunder and not the vachal portion which lies further to the north of the property covered under Ext.A2. Respondent is not claiming any right, apart from the right obtained under Ext.A2. Ext.B2 establishes that the property which lies further to the north of property covered under Ext.A2 originally belonged to their father Varghese Varkey and the said property was one of the items covered under D.R.P.119/1116. Item No.2 therein, was 17 cents and it was purchased by Mahadevan Subramania Iyyer to whom Ext.B2 sale certificate was issued by the court. It is clear from the evidence that DW2 did not get any right over the vachal portion covered under Ext.B2. As appellants are not claiming any right over Ext.A2 property and it is clear that Ext.A2 does not

take in vachal portion which lies further to north of Nilam covered under Ext.A2, there is no necessity to interfere with the decree granted by courts below.

7. Second appeal is therefore dismissed making it clear that decree granted by courts below relates to only Nilam and vachal comprised in 1 acre 77½ cents covered under Ext.A2 and does not relate to the vachal portion covered under Ext.B2 or which lies further north to the 1.77½ acre plot It is made clear that title claimed under Ext.B5 is not decided in this suit.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.724 OF 1993

24th MAY 2007

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